BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LEWIS WOOD	)	
Claimant	)	
VS.	)	
	)	Docket No. 264,898
WATCO, INC.	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the March 25, 2003 Award of Administrative Law Judge Jon L. Frobish. Claimant was awarded a work disability of 87 percent after the Administrative Law Judge found a task loss of 74 percent and a wage loss of 100 percent. Respondent contends claimant did not put forth a good faith effort to find employment and, therefore, a wage should be imputed. Additionally, respondent argues the task loss opinion of Jeffrey T. MacMillan, M.D., and Pedro A. Murati, M.D., are flawed and the task loss opinion of Edward J. Prostic, M.D., based upon Jerry Hardin's non-duplicative task list, should be utilized to assess claimant a 43 percent loss of tasks. The Appeals Board (Board) heard oral argument on September 17, 2003.

APPEARANCES

Claimant appeared by his attorney, Roger A. Riedmiller of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Janell Jenkins Foster of Wichita, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

ISSUES

What is the nature and extent of claimant's injury and disability? The Board acknowledges this nature and extent dispute primarily focuses on the task and wage loss percentages of impairment under K.S.A. 1999 Supp. 44-510e. It was for that reason, apparently, that the Administrative Law Judge did not determine claimant's percentage of functional impairment. The Board, however, will make a finding as to claimant's functional impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds as follows:

Claimant started working for respondent in November of 1999 as a laborer. On March 17, 2000, while helping lay track, which claimant described as 16-foot switch ties weighing between 800 and 1,000 pounds, he experienced a sudden onset of pain in his low back. This injury was reported to his foreman and claimant was referred for medical treatment. Claimant underwent conservative care with Dr. Kenneth Johnson, Dr. Jeffrey MacMillan and Dr. William Wilkins. Dr. MacMillan ultimately determined that claimant's injury would not resolve with conservative care and, on September 6, 2000, performed an anterior body fusion at L5-S1. Claimant was released on March 12, 2001, at maximum medical improvement. Dr. MacMillan rated claimant at 20 percent to the body as a whole pursuant to the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.), and opined that it would be reasonable to apportion 50 percent of claimant's impairment to his preexisting isthmic spondylolisthesis and 50 percent to the current injury. However, the doctor's preexisting apportionment percentage opinion was not provided pursuant to the AMA *Guides.*

Dr. MacMillan released claimant to return to work, restricting claimant from repetitive or extended periods of bending, stooping and also cautioned against heavy lifting or carrying. He further limited claimant to constant lifting from 10 to 20 pounds, frequent lifting from 25 to 50 pounds and occasional lifting from 50 to 100 pounds. Respondent was unable to accommodate these restrictions, and claimant's employment was terminated.

Dr. MacMillan was provided a task loss report provided by vocational expert Jeff Cordray. This task list contained 66 tasks, of which Dr. MacMillan opined claimant was unable to perform 17, for a 26 percent task loss.

At the time of the continuation of the regular hearing, claimant remained unemployed.

Claimant did not have a working automobile and, therefore, did not start looking for work until May 31, 2001. Claimant testified that he sought employment at approximately ten places per week, but was unable to find employment. When it was requested that claimant verify his employment search, he was only able to prove that he contacted an average of less than one place per week, rather than ten, for the period from his March 22, 2001 layoff to the August 6, 2002 continuation of the regular hearing.

Claimant was referred to orthopedic surgeon Edward J. Prostic, M.D., for a court ordered independent medical evaluation on January 22, 2002. Dr. Prostic verified claimant's prior surgery and diagnosed claimant with spondylolisthesis which was not adequately relieved by that surgery. He assessed claimant a 20 percent impairment to the body as a whole based upon the AMA *Guides* (4th ed.). He restricted claimant from lifting up to 40 pounds occasionally and 15 pounds frequently and cautioned against frequent bending or twisting at the waist, forceful pushing or pulling, use of vibratory equipment or any other back-intensive activities.

Dr. Prostic was provided with a work task analysis report prepared by vocational expert Jerry Hardin. In the initial review of the task list, Dr. Prostic noted that of the 180 tasks listed by Mr. Hardin, claimant was unable to perform 140, for a 78 percent task loss. However, when asked, Mr. Hardin testified that there were only 65 actual tasks which he determined to be non-duplicative. Of those 65 tasks, per Dr. Prostic, claimant was unable to perform 28, for a 43 percent task loss.

Claimant was referred to physical medicine specialist Pedro A. Murati, M.D., on June 21, 2001, for an examination. This examination, requested by claimant's attorney, resulted in a diagnosis of low back pain, post anterior lumbar interbody fusion with BAK prosthesis at L5-S1. Dr. Murati found claimant to have suffered a 22 percent whole person impairment pursuant to the AMA *Guides* (4th ed.). He placed restrictions on claimant, cautioning that claimant should only occasionally stand, walk, climb stairs, climb ladders, squat, push, pull, lift or carry up to 20 pounds. He testified claimant should rarely bend at the waist and should never crawl or lift, push, pull or carry anything greater than 20 pounds. He also recommended alternate sitting, standing and walking, and the use of good body mechanics at all times.

Dr. Murati was also provided Mr. Hardin's task list and concurred with Mr. Hardin's determination that claimant was incapable of performing 140 of the 180 tasks. Dr. Murati did not address Mr. Hardin's determination that there were only 65 non-duplicative tasks in the list. Dr. Murati was also provided a copy of Mr. Cordray's task loss list, finding of the 66 tasks on the list, claimant was incapable of performing 46, for a 70 percent task loss. Dr. Murati acknowledged that he relied exclusively on claimant's description of the jobs that claimant performed as to the physical requirements necessary to perform those jobs and never personally evaluated any of the jobs that claimant performed during the 15 years preceding claimant's injury.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[1]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.[2]

> Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[3]

The Administrative Law Judge and the parties ignored the functional impairment dispute in this matter. However, if for some reason claimant was to obtain employment at a comparable wage sometime in the future, the functional impairment percentage would become significant. The Board will, therefore, determine it as part of this award.

Both Dr. Prostic and Dr. MacMillan found claimant's functional impairment to be 20 percent to the body as a whole. Dr. Murati found claimant's impairment to be 22 percent to the body as a whole. Dr. MacMillan opined that claimant had a preexisting impairment, but did not couch that impairment pursuant to the AMA *Guides*, as is required by K.S.A. 1999 Supp. 44-510e. The Board, therefore, finds no preexisting impairment was proven in this record. The Board finds the opinions of Dr. Prostic and Dr. MacMillan are the more credible and concludes claimant has a 20 percent functional impairment to the body as a whole.

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning

---

[1] K.S.A. 1999 Supp. 44-501 and K.S.A. 1999 Supp. 44-508(g).

[2] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

[3] K.S.A. 1999 Supp. 44-510e(a).

> after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.[4]

It is undisputed that respondent was unable to accommodate the restrictions placed upon claimant by his treating physician. Claimant, therefore, becomes entitled to a work disability under K.S.A. 1999 Supp. 44-510e. That statute, however, must be read in the light of both *Foulk*[5] and *Copeland.*[6] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above quoted statute) by refusing an accommodated job that paid a comparable wage. As no accommodated job was offered claimant in this instance, *Foulk* would not apply. However, in *Copeland*, the Kansas Court of Appeals held, for the purposes of the wage-loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages, rather than the actual earnings, when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[7]

Here, claimant testified to making ten attempts per week at obtaining employment. However, claimant was only able to verify an average of less than one attempt per week. The Board does not find that effort on claimant's part to constitute good faith. The Board will, therefore, impute to claimant a wage based upon his post-injury ability to earn wages pursuant to K.S.A. 1999 Supp. 44-510e. Both Mr. Hardin and Mr. Cordray provided opinions as to claimant's ability to earn wages in the open labor market. The Board finds Mr. Hardin's opinion that claimant can earn $6.50 per hour to be the most credible. When working a 40-hour week, this would constitute a wage of $260. Comparing that to the average weekly wage of $473.70 in the Award, the Board finds claimant suffered a wage loss of 45 percent.

Several task loss opinions were placed into the record by the various testifying physicians. After reviewing the evidence, the Board finds the opinion of Dr. Prostic, when

---

[4] K.S.A. 1999 Supp. 44-510e(a).

[5] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[6] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[7] Id. at 320.

considering the unduplicated list of Mr. Hardin, to be the most credible. While Mr. Hardin originally found 180 tasks in claimant's 15-year work history, he acknowledged when eliminating duplications, only 65 remained. Of these 65, Dr. Prostic indicated claimant incapable of performing 28, for a 43 percent loss of tasks. K.S.A. 1999 Supp. 44-510e obligates that the task loss percentage and the wage loss percentage be averaged in order to determine what, if any, work disability claimant is entitled to. Averaging a 43 percent task loss with a 45 percent wage loss results in a work disability of 44 percent to the body. The Award of the Administrative Law Judge is, therefore, modified to grant claimant a 44 percent permanent partial general disability to the body as a whole.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Jon L. Frobish dated March 25, 2003, should be, and is hereby, modified, and an award is made in accordance with the above findings in favor of the claimant, Lewis Wood, and against the respondent, Watco, Inc., and its insurance carrier, Liberty Mutual Insurance Company, for an accidental injury occurring on March 17, 2000, for a 44 percent permanent partial general disability.

Claimant is entitled to 50.86 weeks temporary total disability compensation at the rate of $315.82 per week totaling $16,062.61, followed by 166.82 weeks permanent partial general disability compensation at the rate of $315.82 per week totaling $52,685.10, for a total award of $68,747.71.

As of September 22, 2003, claimant is entitled to 50.86 weeks temporary total disability compensation at the rate of $315.82 per week totaling $16,062.61, followed by 132.57 weeks permanent partial general disability compensation at the rate of $315.82 per week totaling $41,868.26, for a total due and owing of $57,930.87, minus any amounts previously paid. Thereinafter, claimant is entitled to 34.25 weeks permanent partial general disability compensation at the rate of $315.82 per week totaling $10,816.84 until fully paid or until further order of the court.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of October 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Janell Jenkins Foster, Attorney for Respondent
Jon L. Frobish, Administrative Law Judge
Paula S. Greathouse, Director